AV Asia Sdn Bhd v MEASAT Broadcast Network Systems (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D–22(IP)–64 OF 2010
AZAHAR MOHAMED J
9 DECEMBER 2010

Arbitration — Stay of proceedings — Application — Dispute — Arbitration clause in agreement — Whether plaintiff's case fell within ambit of arbitration agreement — Whether inclusion of third parties in action subjected to an arbitration agreement — Whether valid ground to refuse stay of proceedings — Arbitration Act 2005 s 10

Words and Phrases — 'Shall' — Arbitration Act 2005 s 10 — Meaning of mandatory obligation

The plaintiff filed a RM1.3 billion suit against the first defendant and Tele System Electronics (M) Sdn Bhd for allegedly violating a non-disclosure agreement over a satellite technology to reduce disruption of satellite transmission. The cause of action against the first defendant was for breach of contract and against the second defendant, the tort of inducing a breach of contract. The first defendant applied to this court for an order that all further proceedings in the suit herein against the first defendant be stayed pending reference to an arbitration pursuant s 10 of the Arbitration Act 2005. The first defendant's application is premised on the grounds that the suit herein is in respect of a dispute concerning an alleged breach of a mutual non disclosure agreement ('MNDA') entered between the plaintiff and the first defendant. The first defendant contended that the said MNDA contained an arbitration agreement for all disputes to be referred to the arbitration. It is further argued that the subject matter of the suit herein was within the ambit of the arbitration agreement. The plaintiff argued to the effect that the matter should not go for arbitration because there was no arbitration agreement between the plaintiff and the second defendant. The issue to be determined by the court was whether the dispute between the plaintiff and the first defendant fell within the ambit of the arbitration agreement.

Held, allowing stay application with costs:

(1) On the material facts as disclosed by the plaintiff's statement of claim, there can be no doubt that the plaintiff's cause of action against the first defendant was premised on an alleged breach of the MNDA and thus, fell within the scope and ambit of the arbitration clause (see para 3).

(2) The inclusion of third parties in an action which are not subject to an arbitration agreement will not be a ground to refuse stay of proceedings (see *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394). There is no scope for the court to refuse a stay of proceedings on the ground that the third parties are involved. The court will uphold the right to arbitration notwithstanding the fact that there is a claim against a third party (see para 12).

(3) Since the plaintiff and the first defendant had mutually agreed to refer all disputes arising out of the MNDA to an arbitration and since the dispute between them was evidently and unmistakably a dispute that arose out of the MNDA, such mutual preference as set out in the written agreement must be respected. As observed by the Court of Appeal in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656, parties who made a contract to arbitrate their disputes, should be held to their bargain and it is the prima facie duty of the court to act upon such an arbitration agreement (see para 13).

[Bahasa Malaysia summary

Plaintif memfailkan satu guaman RM1.3 bilion terhadap defendan pertama dan Tele System Electronics (M) Sdn Bhd kerana didakwa melanggar sebuah perjanjian yang tidak dikemukakan bagi teknologi satelit untuk mengurangkan gangguan transmisi satelit. Kausa tindakan terhadap defendan pertama adalah kemungkiran kontrak dan terhadap defendan kedua, tort mendorong kemungkiran kontrak. Defendan pertama memohon kepada mahkamah bagi perintah untuk semua prosiding dalam guaman ini terhadap defendan pertama digantung sementara rujukan kepada timbangtara menurut s 10 Akta Timbangtara 2005. Permohonan defendan pertama berasaskan alasan-alasan bahawa guaman ini adalah berkenaan pertikaian mengenai dakwaan pelanggaran perjanjian bersama yang tidak dikemukakan ('PBTD') yang dimeterai antara plaintif dan defendan pertama. Defendan pertama menghujahkan bahawa PBTD tersebut mengandungi perjanjian timbangtara bagi semua pertikaian untuk dirujuk kepada timbangtara. Hujahnya lagi bahawa perkara guaman ini berada dalam lingkungan perjanjian timbangtara. Plaintif menghujahkan bahawa perkara ini tidak harus dibawa ke timbangtara kerana tiada perjanjian timbangtara antara plaintif dan defendan kedua. Isu yang harus diputuskan oleh mahkmah adalah sama ada pertikaian antara plaintif dan defendan pertama jatuh dalam lingkungan perjanjian timbangtara.

Diputuskan, membenarkan permohonan pergantungan dengan kos:

(1) Berdasarkan fakta material yang dikemukakan dalam penyataan tuntutan, tiada keraguan bahawa kausa tindakan plaintif terhadap defendan pertama adalah berasaskan dakwaan kemungkiran PBTD dan dengan itu, terangkum dalam skop dan lingkungan timbangtara (lihat perenggan 3).

(2) Kemasukan pihak ketiga dalam tindakan yang bukan subjek kepada timbangtara bukan alasan untuk menolak permohonan pergantungan (lihat *Renault SA v Inokom Corporation Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394). Tiada skop untuk mahkamah menolak permohonan pergantungan atas alasan bahawa pihak ketiga terlibat. Mahkamah akan memelihara hak kepada timbangtara walaupun fakta bahawa terdapat tuntutan terhadap pihak ketiga (lihat perenggan 12).

(3) Memandangkan plaintif dan defendan pertama telah bersetuju bersama untuk merujuk semua pertikaian yang timbul daripada PBTD kepada timbangtara dan memandangkan pertikaian antara mereka adalah jelas dan tidak syak lagi pertikaian yang timbul daripada PBTD, keutamaan bersama seperti yang dinyatakan dalam perjanjian bertulis mestilah dipatuhi. Seperti yang dilihat oleh Mahkamah Rayuan dalam *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656, pihak-pihak yang berkontrak untuk menimbangtara pertikaian-pertikaian mereka, hendaklah berpegang kepada persetujuan mereka dan adalah prima facie tugas mahkamah untuk bertindak menurut perjanjian timbangtara tersebut (lihat perenggan 13).]

Notes

For cases on application, see 5 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1752–1798.

Cases referred to

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656; [2010] 7 CLJ 785, CA (refd)

Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors [2009] 6 MLJ 729; [2009] 9 CLJ 32, HC (refd)

Busuk Jamilah Salim & 70 Ors v Siti Rahfizah Mihaldin & Anor ; [2009] 1 LNS 1358, HC (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor [2008] 1 MLJ 233; [2008] 1 CLJ 496, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 2, 10, 10(1)(a)

Feroz Hussin (RS Sodhi, Hafarizam and Reza Hassan with him) (Peters & Mohd Fuad) for the plaintiff.

N Navaratnam (CH Wong with him) (Kadir, Andri & Partners) for the first defendant.

Kumar (Kumar Partnership) for the second defendant.

Azahar bin Mohamed J:

[1] On 28 September 2010, AV Asia and Bhd ('the plaintiff') filed a RM1.3 billion suit against MEASAT Broadcast Network Systems Sdn Bhd ('the first defendant') and Tele System Electronics (M) Sdn Bhd for allegedly violating a non-disclosure agreement over a satellite technology to reduce disruption of satellite transmission.lt is noteworthy to observe that the cause of action against the first defendant is for breach of contract, whilst against the second defendant is for the tort of inducing a breach of contract.

[2] The first defendant then took out the present summon in chambers dated 19 October 2010 ('encl 4') seeking, inter alia, for an order that all further proceedings in the suit herein against the first defendant be stayed pending reference to arbitration pursuant to s 10 of the Arbitration Act 2005 ('the Act'). Section 10 provides:

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[3] The first defendant's application is premised on the grounds that the suit herein is in respect of a dispute concerning an alleged breach of a mutual non-disclosure agreement ('MNDA') entered between the plaintiff and the first defendant on 1 August 2008. It is the contention of the first defendant that the said MNDA contains an arbitration agreement for all disputes to be referred to arbitration. It is further argued that the subject matter of the suit herein is within the ambit of the arbitration agreement.

[4] It is an established principle of law that the provisions of s 10 make it mandatory for the court before which the proceeding is brought in respect of a

matter which is the subject of an arbitration agreement to make an order for stay of proceedings and refer the parties to arbitration. The word 'shall' that appears in s 10 imposes a mandatory obligation to stay the proceedings and refer the parties to arbitration in respect of matter which is the subject of an arbitration agreement (see *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233; [2008] 1 CLJ 496; *Busuk Jamilah Salim & 70 Ors v Siti Rahfizah Mihaldin & Anor* ; [2009] 1 LNS 1358; *Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors* [2009] 6 MLJ 729; [2009] 9 CLJ 32; *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; and *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785).

[5] In the present case it cannot be disputed that the MNDA in question clearly provides for the parties to go for arbitration at cl 21 that reads as follows:

> this NDA shall be governed by the laws of Malaysia and all disputes arising out of this NDA shall be resolved by arbitration at the Kuala Lumpur Regional Centre for Arbitration in accordance with the Rules of Arbitration of the Regional Centre for Arbitration Kuala Lumpur.

[6] I pause here to say that I do not think the provision as mutually agreed to by the plaintiff and the first defendant can be anything but obligatory and binding if the dispute falls within the ambit of the clause in question.

[7] A good starting point, then, is to ask whether the dispute between the plaintiff and the first defendant falls within the meaning of the arbitration agreement.

[8] For this purpose, it is important to take a closer look at the plaintiff's statement of claim in so far as the first defendant is concerned. On or about the 7 May 2009 the first defendant conducted a tender exercise inviting bidders to submit tenders for the supply of satellite dish to the first defendant similar to the satellite dish which formed the subject matter of the matter of the MNDA. On or about 14 July 2009 the first defendant conducted a second tender exercise inviting bidders to submit tenders for the supply of satellite dist to the first defendant, similar to the satellite dish which formed the subject matter of the MNDA. In breach of the terms of the MNDA the first defendant disclosed the following confidential information to the tender bidders in the second tender exercise.

(a) Confidential information and recommendations contained in the result of performance list dated 30.10.2008 regarding comparisons between the first defendant's Satellite Dish and the plaintiff's Satellite Dish.

(b) Confidential information and recommendations contained in the Demo Report.

(c) Confidential information pertaining to the plaintiff's Satellite Dish specifications and the recommendations made.

(d) Confidential information regarding the plaintiff's 'Gain over Temperature' ('G/T') specifications and recommendations made.

(e) Confidential information regarding the plaintiff's 'Carrier over Noise' ('C/N') specifications and recommendations.

(f) Confidential information regarding the plaintiff's 'Low Noise Block ('LNB') and ('Noise Figure') specifications and recommendations.

(g) Confidential information regarding the unmatching of the 'Antenna' and 'Feedhorn') and the recommendations made.

(h) Confidential information regarding the inaccuracy of the dish surface and the recommendations made.

(i) Confidential information regarding the antenna aperture and antenna noise efficiency and the recommendations made.

(j) Confidential information regarding the LNB Lo stability and the recommendations made.

(k) Confidential information regarding the image rejection levels and the recommendations made.

[9] The plaintiff's statement of claim then goes on to plead that in breach of the mnda and at some time unknown to the plaintiff the first defendant divulged to the second defendant some or all of the confidential information as referred to earlier relating to the plaintiff's satellite dish that was disclosed to the first defendant by the plaintiff. The second defendant used such confidential information to design and test for the first defendant and/or the first defendant's customers satellite dishes which are almost identical to that of the plaintiff's satellite dish. By the reason of the matters aforesaid, the plaintiff has suffered loss and damage.

[10] On the material facts as disclosed by the plaintiff's statement of claim, there can be no doubt that the plaintiff's cause of action against the first defendant is premised on an alleged breach of the MNDA dated 1 August 2008. That is why to my mind the dispute between the plaintiff and the first defendant as set out in the statement of claim is clearly a dispute that arises out of the MNDA and thus falls within the scope and ambit of the arbitration clause.

[11] Still, I need to consider learned counsel for the plaintiff's argument to the effect that the matter should not go for arbitration because there was no arbitration agreement between the plaintiff and the second defendant. Learned counsel placed heavy reliance on the fact that there is no arbitration agreement which binds all the parties to the present to arbitrate. He then argued that this

matter falls within the exemption contained in s 10(1)(a) of the Act because, as he put it, the arbitration agreement between the plaintiff and the first defendant is inoperative or incapable of being performed vis-a-vis the 'parties' to the proceedings as the second defendant is not a party to the arbitration agreement.

[12] I have given my utmost consideration of the argument but I find myself quite unable to agree with the contention of learned counsel for the plaintiff. My reasons now follow. Learned counsel for the first defendant pointed out, I think quite rightly, that by virtue of s 2 of the Act, the expression 'parties' in s 10(1)(a) must be a reference to referring to all the parties to an arbitration agreement, that is to say in the present proceedings the plaintiff and the first defendant. I do not see how, as argued by learned counsel for the plaintiff, the words 'unless the context otherwise requires' appear in s 2(1) helps his argument that the word 'parties' in s 10(1)(a) have to do to all the parties who are before the court, that is to say in the present proceedings including the second defendant, who is not a party to any arbitration agreement. It is true that as I have pointed earlier in the judgment, the present proceedings include the subject of the tort of inducing a breach of contract and this is not a matter which is the subject matter of an arbitration agreement. But one important point requires to be kept in mind. The cause of action based on the tort of inducing a breach of contract is directed at the second defendant and not the first defendant. Over and above, as far as this court is concerned and in so far as it is relevant to the present matter, I think the following principle of law is well settled by the decision of the Court of Appeal in *Renault SA v Inokom Corp Sdn Bhd & Anor* and other appeals: the inclusion of third parties in an action which are not subject to an arbitration agreement will not be a ground to refuse stay of proceedings. There is no scope for the court to refuse a stay of proceedings on the ground that third parties are involved. The court will uphold the right to arbitration notwithstanding the fact that there is a claim against a third party (see *Russell on Arbitration*, (23rd Ed) paras 7–048).

[13] In my judgment, since the plaintiff and the first defendant had mutually agreed to refer all disputes arising out of the MNDA to arbitration and as I have already expressed my view that the dispute between them is evidently and unmistakably a dispute that arises out of the MNDA, such mutual preference as set out in the written agreement must be respected. As observed by our Court of Appeal in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd*, parties who made a contract to arbitrate their disputes, should be held to their bargain and it is the prima facie duty of the court to act upon such an arbitration agreement.

[14] Therefore, to sum it up, based on all the previous mentioned reasons, I conclude by saying that the first defendant has succeeded to bring itself within

A the strict ambit and scope of the provisions of s 10 of the Act. Hence, the first defendant is entitled to have the dispute referred to arbitration. This is the reason why I allow the first defendant's stay application (encl 4) with costs.

Stay application allowed with costs.

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Reported by Ashgar Ali Ali Mohamed

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